SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 23 1964
JOHN F. DAVIS, CLERK

No. 779

In The

# Supreme Court of the United States

October Term, 1963

WILMER D. REKEWEG, AS GUARDIAN OF MITCHELL D. ONSTOTT, A MINOR; AND HARVEY H. ONSTOTT, PETITIONERS,

vs.

FEDERAL MUTUAL INSURANCE COMPANY AND J. B. GUTHRIE, RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. Gareth Hitchcock,
South Side of Square, Paulding, Ohio,
Howard S. Grimm,
Suite 5, Union Bldg., Auburn, Ind.,
*Attorneys for Petitioner.*

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

Leigh Hunt
Hunt, Suedhoff & Wilks
625 Lincoln Bank Tower
Fort Wayne, Indiana
Attorneys for Respondents.

## INDEX


Citations to Opinions Below ..... 1
Jurisdiction ..... 2
Questions Presented ..... 2
Statutes, Law and Regulations Involved ..... 3
Statement of the Case ..... 4
How Questions for Review are Presented ..... 6
Reasons for Allowance of the Writ ..... 7


### Cases Cited


Chinn v. Trustees, 32 Ohio St. 236 (1877) ..... 9
Delson v. Minoque, E.D.N.Y., 190 F Supp 935 (1961) ... 16
Household Finance Corp. v. Sutich, 92 OLA 444, 446 (1963) ..... 14
Howe, In re Estate of, 107 Ohio App. 361, 159 NE2d 622, 8 O.O.2d 321 (1958) ..... 16
Jones v. Draper, 16 OCD 785, 4 CirCtr, NS 105, affirmed 73 Ohio St. 369, 78 NE 1124 (1903) ..... 3
Perry v. Wills, 9 OLA 613 (1931) ..... 15
Public Loan Corporation v. Hood, 71 OLA 423, 125 NE2d 770 (1955) ..... 14
Pumphrey v. Quillen, 165 Ohio St. 343, 135 NE2d 328, 59 OO 460 (1956) ..... 4
Saberton v. Greenwald, 146 Ohio St. 414, 66 NE2d 224, 32 OO 454, 165 ALR 599 (1946) ..... 17
Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944) ..... 8

Schubert v. Neyer, Ohio App., 165 NE2d 226, 12 OO2d 231 (1959) ..... 15
Sigler v. Allstate Insurance Company, 7 Cir., 319 F2d 418 (1963) ..... 16
State v. Trisler, 49 Ohio St. 583, 31 NE 881 (1892) ..... 15
State, ex rel Board of Education v. Steeley, 21 Ohio App 396, 153 NE 285 (1926) ..... 10
Steiner v. Roberts, Ohio App, 72 OLA 391, 131 NE2d 238 (1955) ..... 15
Warner v. First National Bank of Minneapolis, 8 Cir., 236 F2d 853, certiorari denied 352 US 927, 77 S Ct 226, 1 LEd2d (1956) ..... 8
White Motor Company v. United States, 372 U.S. 253, 83 S.Ct. 696, 697 ... L.Ed2d 738. (Mar. 4, 1963) .. 8

**Statutes Cited**

28 U.S.C. Sec. 1254 (1) (1948) ..... 2
28 U.S.C. Sec. 1332 ..... 3
28 U.S.C. Sec. 1332 (a) (1) (1958) ..... 6
Sec. 2311.041 (D) Revised Code of Ohio ..... 8

**Other**

Rule 56, Federal Rules of Civil Procedure ..... 3, 8, 9
THE COMMON LAW, Holmes, 36th Printing, Little, Brown and Company, Boston, 1944 ..... 10

**Index to Appendix of Record on Appeal in the Circuit Court**

Amended Complaint ..... 1
Order and opinion of the district court, Hon. Robart A. Grant made February 24, 1961 ..... 8
Paragraph Three of Joint and Several Answer of Defendants Federal Mutual Insurance Company and J. B. Guthrie ..... 14

Plaintiff's demand for jury trial ..... 16
Excerpts from Testimony of Attorney David Peters... 17
Affidavit of J. B. Guthrie annexed to defendants' motion for summary judgment ..... 21
Exhibits to Plaintiffs' Motion for leave to file additional affidavit in opposition to defendants' motion for summary judgment and any reconsideration thereof ..... 28
Order and opinion of district court, Hon. Jesse E. Eschbach made September 28, 1962, denying defendants' motion for summary judgment ..... 32
Order and opinion of district court, Hon. Jesse E. Eschbach vacating prior order denying summary judgment to defendants and granting them summary judgment ..... 37
Order and opinion of district court, Hon. Jesse E. Eschbach vacating grant of summary judgment until the whole cause could be disposed of ..... 43
Order and opinion of district court, Hon. Jesse E. Eschbach granting plaintiffs' motion to dismiss as to David Peters and entering final judgment in favor of defendants Federal Mutual and Guthrie ..... 51
Notice of Appeal ..... 53
Excerpts from Plaintiffs' brief in opposition to defendants' motion for summary judgment ..... P 3 of Appendix to Defendants' Answer Brief Below
Excerpts of testimony of attorney David Peters ... P 1 of Additional Appendix of Record on Appeal to the Reply Brief Below
Excerpts from Plaintiffs' motion for leave to file additional affidavit in opposition to defendants' motion for summary judgment ..... P 2 of Additional Appendix to Reply Brief

In The

# Supreme Court of the United States

October Term, 1963

No. ———

WILMER D. REKEWEG, AS GUARDIAN OF MITCHELL D. ONSTOTT, A MINOR; AND HARVEY H. ONSTOTT, PETITIONERS,

vs.

FEDERAL MUTUAL INSURANCE COMPANY AND J. B. GUTHRIE, RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment made on October 23, 1963, in this case by the United States Court of Appeals for the Seventh Circuit.

### Citations to Opinions Below

The opinion of the judges of the United States Circuit Court of Appeals for the Seventh Circuit is reported at 324 F 2d 150 and is printed in the Appendix hereto, p. 1, et seq. The opinions of the United States District Court for the Northern District of Indiana, Fort Wayne Division, as hereinafter listed are not reported and appear in the

Appendix of Record on Appeal from the circuit court as shown:

September 28, 1962, Record Appendix, p. 32 et seq.

November 28, 1962, Record Appendix, p. 37 et seq.

December 19, 1962, Record Appendix, p. 43 et seq.

Also, the opinion of the district court dated February 24, 1961, is reported in 27 F. R. D. 431 and in pertinent part is printed in the Record Appendix, p. 8 et seq.

## Jurisdiction

The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, United States Code.

The judgment for review is that of the United States Court of Appeals for the Seventh Circuit entered October 23, 1963.

Petitioners ask review of this judgment because they believe:

(1) it decides an important state question in a way that is in conflict with applicable state law;

(2) it decides by inference an important question of procedure in the United States courts by holding, in effect, that under Rule 56, Federal Rules of Civil Procedure, a summary judgment may be granted while there remains a genuine issue as to a material fact, thereby denying petitioners a jury trial;

(3) its implications for beneficiaries of insurance policies and for attorneys, throughout the country, are incalculable and anything but salutary to the ends of justice.

## Questions Presented

1. Does Ohio law recognize the common law action of fraud and deceit?

2. Can petitioners, by summary judgment under Rule 56, Federal Rules of Civil Procedure, be deprived of a jury

trial where there are unresolved genuine issues of material fact, and where a jury trial has been timely demanded?

## Statutes, Law and Regulations Involved

Section 1332, Title 28, United States Code, in pertinent part provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different states; . . ."

Rule 56, Federal Rules of Civil Procedure, as in effect prior to July 1, 1963, in pertinent part, read:

"• • •

"(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

"(c) *Motions and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. • • •"

Paragraph 4 of the syllabus stating the law of the case of *Jones v. Draper*, 16 OCD 785, 4 Cir Ct R, NS 105, affirmed at 73 O.S. 369, 78 N.E. 1124 (1903) reads:

> "If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete investigation, would be justified."

This opinion comments on facts similar to the facts of this case, at 4 Cir Ct R, NS 117 and 16 OCD 796, as follows:

> "'Allowing the other party to proceed upon an erroneous belief to which one's acts have contributed is active concealment tantamount to misrepresentation' (Wald's Pollock on Cont., p. 515, citing cases)."

In syllabi prepared by the court in *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E. 2d 328, 59 O.O. 460 (1956), the Supreme Court of Ohio stated the law of Ohio:

"1. In an action for fraudulent misrepresentation, it is not necessary for the plaintiff to allege and prove that the defendant made the representation knowing that it was false.

"2. In such an action it is not a defense for the defendant to assert that he made the representation without knowing whether it was true or false, if his statement was made under circumstances which implied knowledge on his part."

## Statement of the Case

The opinion of the court of appeals (Appendix, pp. 1-4) well states the case except in several fundamentally important respects, viz:

(1) It ignores the fact that respondent Guthrie sought out petitioner's then attorney David Peters of Fort Wayne, Indiana, and on September 11, 1958 discussed with him petitioner's case and affirmatively represented to said attorney that:

> (a) he thought petitioner's case had settlement value;
>
> (b) his company was going to be fair and reasonable in the circumstances;
>
> (c) his company would work out a settlement if at all possible;
>
> (d) no settlement could, of course, be arrived at without final medical reports so the minor petitioner's injuries could be evaluated. Also

(2) It fails to disclose the fact that on this 11th day of September, 1958, when Fett, the alleged tort feasor had been dead only two months and twenty-eight days, Guthrie learned that:

(a) Peters had read the Ohio statutes re claims against estates which give claimants up to four months after the appointment of an administrator or executor in which to file claims as a matter of right and up to five months additional time to persons under disability in which to apply to the probate court for allowance of claim;

(b) Peters was willing to actively strive for an amicable settlement of petitioners' claims, and

(c) Guthrie in no way indicated to Peters he would not disclose knowledge of the Fett estate as Peters requested him to do.

(3) It misstates what happened on December 2, 1958, which was that Guthrie's supervisor was in Fort Wayne and telephoned Peter's office and asked for the medical report conceded by both Guthrie and Peters on September 11, 1958, as being necessary to any evaluation of petitioner's case.

(4) It ignores the fact that in January, 1959, Federal Mutual asked an Ohio attorney if the minor petitioner's claim was barred by Ohio law and on February 11, 1959, was correctly informed that unless appropriate action were taken it would be barred on April 1, 1959.

(5) Although it states that Guthrie telephoned Peter's office on October 3, 1958, and informed his secretary that Fett's estate had been opened in Ohio, it fails to show that this fact is controverted and denied by petitioners' amended complaint and Peters' deposition that he never received any such information from Guthrie until June, 1959; and that Guthrie had previously on May 8, 1959, when questioned by a superior as to what he had done which might subject "us to any criticism" failed to make mention of

conveying to Peters anything about Fett's estate and that upon trial petitioners planned to offer testimony of Peters' two secretaries that no such message was received by them from Guthrie on October 3, 1958, or any other day, as shown by their listing in the pre-trial order as witnesses for petitioners, although petitioners confess they failed to excerpt a copy of the pre-trial order for inclusion in the Appendix of Record on Appeal as per Rule 16 of the Court of Appeals for the Seventh Circuit. The names and addresses of these two secretaries, however, are shown at paeg 3 of the Appendix of Record on Appeal attached to respondents' Answer Brief in the Court of Appeals. Moreover, despite these facts, the opinion assumes that there is no issue as to whether or not Guthrie failed to disclose his knowledge of the Fett estate to a secretary of attorney David Peters on October 3, 1958, or any other day prior to April 1, 1959, which petitioners emphatically deny.

This cause was begun with the filing of a complaint on March 22, 1960, in the United States District Court for the Northern District of Indiana, Fort Wayne Division by petitioner under leave of Section 1332 (a) (1), Title 28, United States Code. By amended complaint filed May 31, 1960, petitioner Harvey H. Onstott was made an additional party plaintiff.

**How Questions for Review Are Presented**

Petitioners, as plaintiffs, on May 31, 1960, filed their amended complaint which in no way changed the basic cause of action against respondents. Record Appendix, p. 1 et seq.

Respondents, as defendants, on August 30, 1962, filed a motion for summary judgment which the district court, on September 28, 1962, denied. Record Appendix, p. 32, et seq.

Respondents, on October 4, 1962, filed a motion requesting

reconsideration of the court's order denying their motion for summary judgment.

Petitioners, on October 8, 1962, filed a motion requesting leave to file additional affidavit in opposition to respondents' motion to reconsider filed October 4, 1962.

On November 28, 1962, the district court vacated its order dated September 28, 1962 denying respondents' motion for summary judgment and made an order granting them summary judgment. Record Appendix, p. 37 et seq.

On December 19, 1962, the district court vacated the order of November 28, 1962, as having been inadvertently entered and withdrew same until such time as a final order disposing of the whole case as to respondents and the remaining co-defendant David Peters, could be made. Record Appendix, p. 43 et seq.

On February 15, 1963, the district court granted petitioners' motion to dismiss defendant David Peters, with prejudice, and awarded final judgment for respondents as movants entitled to summary judgment. Record Appendix, pp. 51, 52.

On October 23, 1963, the court of appeals for the seventh circuit affirmed the judgment of the district court. Appendix, p. 6.

## Reasons for Allowance of the Writ

Petitioners sincerely regret the necessity of calling upon this court in view of the many pressing and volatile problems currently being presented in the fields of civil rights, reapportionment, taxation and administrative law but they sincerely feel that they have been denied basic justice because (1) the courts below have completely failed to recognize the law of Ohio applicable to the facts of this case; and (2) a summary judgment has been improperly utilized

to deny them a jury trial while there remains a genuine issue of material fact.

Petitioners believe that the effect of the judgment below is to hold that a simple affidavit of fact which is contrary to the allegations of the complaint and the deposition of another party, and is inconsistent with a prior statement of affiant made more than a year earlier when his memory should have been much better, can be utilized to establish a fact as genuine and not at issue and not subject to cross examination, unless counter affidavits of all other persons having knowledge of the facts have been filed. But Rule 56, Federal Rules of Civil Procedure, as in effect prior to July 1, 1963, did not require this as did subdivision "D" of Section 2311.041 of the Revised Code in respect to summary judgments in Ohio state courts. Moreover, this Court, petitioners are told, for some time refused to amend said Rule 56 to require counter affidavits in such circumstances. See Wills, "Developments in Summary Judgment Procedures" XXXIV Ohio Bar, p. 1207 at pp. 1213-1214. When amended Rule 56 was adopted by this Court January 21, 1963 (83 S. Ct. 13) it was opposed by two of the justices (83 S. Ct. 43, 44). That no such requirement was present when this case was decided is recognized by this Court in the second paragraph of its opinion in *White Motor Company v. United States*, 372 U. S. 253, 83 S. Ct. 696, 697, 9 L. Ed 2d 738 (Mar. 4, 1963). At the very least, the district court should have, upon the facts of record, given petitioners as plaintiffs reasonable time in which to produce clarifying evidence. The reason is they were not the movants and it was the district court's duty to construe pleadings and evidential material most strongly in petitioners' favor. This definitely was not done. *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (at 627); 64 S. Ct. 724; 8 L Ed 967; reh. den. 327 U.S. 767, 64 S. Ct. 941, 88 L Ed 1593. (1944). *Warner v. First National Bank of Minne-*

*apolis*, C. A. 8, 236 F 2d 853, certiorari denied 352 U. S. 927, 77 S. Ct. 226, 1 L Ed 2d 162 (1956).

Petitioners, however, considering the nature of this action and the Ohio law fail to see how the truth can be ascertained without observation of the actors in this drama upon the stand and under cross-examination. Consequently, summary judgment under the circumstances is not available to the district court and petitioners believe the final paragraph of the Advisory Committee's Note to the Proposed Amendment of Rule 56 (83 S. Ct. 74, 75) eloquently states the reasons why, to-wit;

> "Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows, under subdivision (f) that he cannot at the time present facts essential to justify his opposition."

Petitioners believe that the courts below have held, in effect, that Mr. Justice Oliver Wendel Holmes, Jr. didn't know the elements of the common law action of fraud and deceit and that Ohio does not recognize as actionable this common law action, and that these conclusions are contrary to fact. Mr. Justice Holmes' delineation of the elements of fraud and deceit are all important here because the Supreme Court of Ohio in *Chinn v. Trustees*, 32 Ohio St. 236, (1877) held in the syllabus stating the law of the case:

> "2. The civil action of the Code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity, and does not embrace proceedings in mandamus."

From this position the Ohio Supreme Court had never before nor has it since deviated or retreated although the Ohio legislature subsequently defined mandamus proceedings as civil actions. In 1926 an Ohio Court of Appeals, in a decision never further appealed, modified, or overruled outlines and confirms the fact that all actions known at common law at the time Ohio first adopted its Code of Civil Procedure effective July 1, 1853, are retained and continued in Ohio, unless subsequently changed by legislative or judicial action. *State, ex rel Board of Education v. Steeley*, 21 Ohio App. 396, 153 NE 285 (1926). If there is any decision of the Supreme Court of Ohio or any Court of Appeals of Ohio, or any Ohio legislative enactment stating that conduct warranting an action in fraud and deceit at common law in 1853 must today be more heinous than then in order to be judicially recognizable, petitioners have been unable to locate it. Consequently, what Mr. Justice Holmes has to say on this question is important here.

Mr. Justice Holmes says of "Fraud, Malice, and Intent" in "THE COMMON LAW", 36th printing, Little Brown & Company, Boston, 1944; at page 132:

"* * * Deceit is a notion drawn from the moral world, and in its popular sense distinctly imports wickedness. The doctrine of the common law with regard to it is generally stated in terms which are only consistent with actual guilt, and an actual guilty intent. It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it, if the person addressed believes it, and is thereby persuaded to act to his own harm. (Petitioners' Note: In the matter for review here it is the concealment of a vital fact under circumstances amounting to false representation that is

the gravamen of the complaint.) This is no doubt the typical case, and it is a case of intentional moral wrong. Now, what is the party's conduct here. It consists in uttering certain words, (p. 133) so ordered that the utterance of them imports a knowledge of the meaning which they would convey if heard.

"But that conduct with only that knowledge is neither moral nor immoral. Go one step further, and add the knowledge of another's presence within hearing still the act has no determinate character. The elements which make it immoral are the knowledge that the statement is false, and the intent that it shall be acted on.

"The principal question then is, whether this intent can be reduced to the same terms as it has been in other cases. There is no difficulty in the answer. It is perfectly clear that the intent that a false representation should be acted on would be conclusively established by proof that the defendant knew that the other party intended to act upon it. If the defendant foresaw the consequence of his acts, he is chargeable, whether his motive was a desire to induct the other party to act, or simply an unwillingness for private reasons to state the truth. If the defendant know a present fact (the other party's intent), which, according to common experience, made it likely that his act would have the harmful consequence, he is chargeable, whether he in fact foresaw the consequence or not.

"* * *

(p. 134) "With regard to the intent necessary to deceit, we need not stop with the single instance which has been given. The law goes no farther than to require proof either of the intent, or that the other party was justified in inferring such intention. So that the whole meaning of the requirement is, that the natural and manifest tendency of the representation, under the known circumstances, must

have been to induce the opinion that it was made with a view to action, and so to induce action on the faith of it. The standard of what is called intent is thus really an external standard of conduct under the known circumstances, and the analysis of the criminal law holds good here.

(p. 135) "The question is, what known circumstances are enough to throw the risk of the statement upon him who makes it, if it induces another man to act, and it turns out untrue. Now, it is evident that a man may take the risk of his statement by express agreement, or by an implied one which the law reads into his bargain. He may — in legal language warrant the truth of it, and if it is not true, the law treats it as a fraud, just as much when he makes it fully believing it, as when he knows that it is untrue, and means to deceive. If, in selling a horse, the seller warranted him to be only five years old, and in fact he was thirteen, the seller could be sued for deceit at common law, although he thought the horse was only five. The common-law liability for the truth of statements is, therefore, more extensive than the sphere of actual moral fraud.

"(p. 137) The elements of deceit which throw the risk of his conduct upon a party are these. First, making a statement of facts purporting to be serious. Second, the known presence of another within hearing. Third, known facts sufficient to warrant the expectation or suggest the probability that the other party will act on the statement. (What facts are sufficient has been specifically determined by the courts in some instances; in others, no doubt, the question would go to the jury on the principles heretofore explained.) Fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the

matter of the statement must be such as would not warrant belief according to the ordinary course of human experience. . . ."

Petitioners believe that the court below has held that any insurance adjustor may invalidate any policy of insurance by practicing fraud and deceit upon a claimant's attorney through misrepresentations of fact or the equivalent thereof, such as concealing from such attorney knowledge of facts he has promised to reveal, and that this holding is contrary to the case law of Ohio. David Peters, petitioner's attorney in 1958, within two months and 28 days of the death of the insured tort feasor, John Fett, knew the law of Ohio re claims against estates. Adjustor Guthrie's promise to be fair and reasonable and agreement to disclose knowledge of Fett's estate were made one month and two days before petitioner's right to file a claim against Fett estate could possibly be, under Ohio law, terminated as a matter of right, and within five months thereafter as to persons under disability as was the minor petitioner. Consequently, how can his concealment from Peters of this knowledge of the Fett estate being opened in July be, under these circumstances, anything other than unconscionable and calculated to deceive to petitioner's harm?

Concerning representations as to matters of fact, the truth of which can only be established by investigation, the law of Ohio was stated in syllabus, in a case where the sale of oil leases was effected by means of fraudulent representations and which sale was set aside and reconveyance with damages ordered, as follows:

> "If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete investigation, would be justified." Jones v.

Draper, 4 Cir Ct R, NS 105, 16 OCD 785, affd. 73 Ohio St. 369, 78 NE 1124 (1903).

In its opinion at p. 117 4 Cir Ct R, NS and p. 796 of 16 OCD, the court quoted with approval the following language:

> "'Allowing the other party to proceed upon an erroneous belief to which one's acts have contributed is active concealment tantamount to misrepresentation.' (Wald's Pollock on Cont., p. 515, citing cases)."

Surely this is precisely the situation encountered by petitioner's attorney in 1958. Certainly it is material that respondent Guthrie spoke to attorney Peters one month and nineteen days prior to November 1, 1958 (when in fact the time expired during which any claimant might have filed claim against the decedent's estate in Ohio as a matter of right) and made certain promises to him and concealed certain exceptionally important information from him which had been the subject of their conversation of September 11, 1958.

To say that attorney Peters had no right to rely on Guthries' misrepresentation (or here the equivalent thereof) because other factors were present does not, under Ohio law, help respondents because in Ohio:

> "It is not necessary to the predication of fraud, that a misrepresentation be the sole cause or inducement of the contract or transaction in question, and the only element relied upon by the representee contributing to the result so long as it does constitute a material inducement."

See *Public Loan Corporation v. Hood*, 71 OLA 423, 427, 125 NE 2d 770 (1955); and *Household Finance Corp. v. Sutich*, 92 OLA 444, 446 (1963).

The Ohio rule that statements of fact may be relied upon even though their untruth can be established by

examination of available public records has, so far as petitioners can discover, never been deviated from by any Ohio court, but has been followed without exception. See last paragraph, *State v. Trisler*, 49 Ohio St. 583, 31 NE 881 (1892); *Perry v. Wills*, 9 OLA 613 (1931); and *Steiner v. Roberts*, 72 OLA 391, 131 NE 2d 238 (1955). In the latter case at p. 242 of 131 NE 2d it was said:

> "* * * Certainly, in such circumstances as we find in this case, a defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud. . . ."

The reliance of the courts below on *Schubert* v. *Neyer*, Ohio App. 165 NE 2d 226, 12 O.O. 2d 231 (1959), is misplaced because it involved no facts or conduct even similar to petitioners cases. In *Schubert* plaintiff bought a house after inspection. Later a part of the steep hillside in back of the house slid down and damaged the house. Plaintiff had observed the hillside and had asked no questions concerning it. He was not in any manner misled by defendant by promises, misrepresentations, or concealment of anything defendant had promised to reveal. Moreover, the courts below, for reasons obscure to petitioners, ignore this pertinent language from this *Schubert* case found at 165 NE 2d 232, and 12 O. O. 2d 236:

> "* * * In other words, there must be a concealment, the party sought to be charged must have had knowledge of the facts asserted to have been let remain undisclosed, and the silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not, and the uninformed party is deprived to the same extent that he would have been by positive assertion."

Also, this misconduct of Guthrie, under Ohio law, was such as to entitle the adult petitioner to an additional five months in which to petition the Ohio probate court for

allowance of claim. See *In re Estate of Howe*, 107 Ohio App. 361, 159 NE 2d 622, 8 O. O. 2d 321 (1958) Motion to certify overruled Feb. 25, 1959.

To petitioners, the effect of the judgments below, upon every attorney and every beneficiacry of an insurance policy in this country, seems a fantastic one because in effect, it (1) requires that in respect to representations as to matters of fact every attorney must assume that every insurance adjustor is a dishonorable fellow unworthy of belief; and (2) it leaves every beneficiary of an insurance policy whose attorney relies upon an adjustor's misrepresentation of or concealment of a material fact he has promised or obligated himself to reveal without recovery against anyone except possibly his attorney. Petitioners cannot believe this amounts to anything like "equal justice under law," and are certain this result is contrary to the law of Ohio.

The citation by the court of appeals of their own judgment in *Sigler v. Allstate Insurance Company*, 7 Cir., 319 F 2d 418 (1963) in support of the judgment sought to be reviewed seems singularly inappropriate for the reason that that case dealt with misrepresentations of foreign law, not matters of fact necessary to give foreign law effect. Even so, the rule announced in this *Allstate Insurance* case appears to put a premium on rascality, to be a particularly harsh and unsalutary one, and at odds with the preferable rule followed in the 2nd Circuit as announced by the District Judge in *Delson v. Minoque*, 190 F Supp 935, E. D. N. Y. (1961).

Finally, petitioners believe that a fourteen year old boy ought not be deprived of the substance of his cause of action by words and conduct such as occurred here, utilized by an adjustor for the insurance company in his dealings with the boy's attorney. Moreover, such actionable conduct

should result in punitive, as well as compensatory damages, as the Ohio law provides. See *Saberton* v. *Greenwald*, 146 Ohio St. 414, 66 NE 2nd 224, 32 O. O. 454, 165 A.L.R. 599 (1946).

Respectfully submitted,

J. Gareth Hitchcock,
South Side of Square, Paulding, Ohio
Howard S. Grimm,
Suite 5, Union Building, Auburn, Indiana
*Attorneys for Petitioner.*

# APPENDIX

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

---

No. 14171 SEPTEMBER TERM, 1963.—SEPTEMBER SESSION, 1963

---

WILMER, D. REKEWEG, as Guardian of MITCHELL D. ONSTOTT, a Minor; and HARVEY H. ONSTOTT.
*Plaintiffs-Appellants,*
v.
FEDERAL MUTUAL INSURANCE COMPANY, and J. B. GUTHRIE.
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

---

October 23, 1963

---

Before CASTLE, KILEY and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* This diversity action was brought in the District Court by plaintiffs-appellants, Wilmer D. Rekeweg, guardian, and Harvey H. Onstott, father, of Mitchell D. Onstott, a minor who was injured in a collision between a bicycle he was riding and an automobile driven by John S. Fett. Fett died nineteen days after the collision. Plaintiffs seek damages from defendants-appellees,[1] Federal Mutual Insurance Company, carrier of Fett's auto-

[1] David Peters, an Indiana attorney, who was first retained to represent the interests of the injured ward, Mitchell D. Onstott, and of plaintiff Harvey H. Onstott, was also originally named as a defendant but was dismissed from the action for a consideration. The complaint asserted liability against him on the ground of negligence through which plaintiff's claims became barred.

mobile liability insurance, and J. B. Guthrie, an adjuster for the insurance company. Liability is predicated upon alleged deceitful and fraudulent action of the defendants by reason of which plaintiffs assert they were barred from prosecuting their claims against the estate of Fett, whose negligence caused the collision and resulting injuries, due to failure to file claims within the prescribed statuory period.

The District Court granted defendants' motion for summary judgment and plaintiffs appealed.

The collision occurred in Ohio and Fett was a resident of Ohio. The parties agree that plaintiffs' alleged causes of action for being fraudulently prevented from presenting their claims against decedent's estate in Ohio are governed by the law of Ohio, where the loss occurred.

The pertinent facts disclosed by the pleadings and the affidavits and documents presented in connection with the motion for summary judgment may be summarized as follows.

The collision giving rise to the injuries to and hospitalization of Mitchell D. Onstott occurred on May 25, 1958. John S. Fett, the allegedly negligent driver of the automobile involved, who was defendants' insured, died June 13, 1958. In June 1958, David Peters, a Fort Wayne, Indiana, attorney was retained to represent the Onstott's interests. Defendant Guthrie, an adjuster representing the defendant insurance company called on the boy's mother on June 18, 1958. She refused to discuss the matter and referred Guthrie to the Onstotts' attorney, David Peters. Guthrie had no further contacts with the Onstotts. He telephoned Peters and they mutually agreed to discuss the claim at a later date when more information was available.

On July 1, 1958, an administrator of Fett's estate was appointed by the Probate Court of Paulding County, Ohio. Under the law of Ohio, upon the expiration of nine months

from the administrator's appointment presentation of the minor's claim against the estate was barred.

In response to a telephone call from Guthrie on August 8, 1958, inquiring whether a medical report had been received, Peters wrote Guthrie August 11, 1958, enclosing a report and requesting a discussion of the claim. Guthrie and Peters conferred on September 11, 1958. Peters had briefed the Ohio law and was aware of the time limitations governing the filing of claims against Ohio estates. Both knew of Fett's death; neither knew of any assets except the automobile; and neither knew that an administrator of Fett's estate had been appointed. In a deposition Peters testified concerning his September 11, 1958, conversation with Guthrie, as follows:

> "I stated that if I learned an estate was opened in Ohio I would communicate with him [Guthrie] and that if he learned of an estate being opened in Ohio I would like to have him advise me that such procedure had taken place. On that occasion we both concluded that as far as we knew Fett had no assets and he had no estate."

Peters further stated that the boy was still under the care of physicians and surgeons at that time and, as yet, he had no evaluation with reference to the injuries.

On September 24, 1958, Guthrie learned that Fett's estate had been opened up on July 1, 1958. He was next in Fort Wayne on October 3, 1958, at which time he telephoned Peters' office but was informed Peters was not in. He left word with one claiming to be a secretary for Peters, to tell him that Guthrie had called, and requested that she inform Peters that an estate for John S. Fett had been opened July 1, 1958. Guthrie was again in Fort Wayne on October 24, 1958, at which time he talked with Peters by telephone and was informed by him that the latest medical report

Peters was expecting had not been received but that a copy would be sent to Guthrie when it was received. On December 2, 1958, Guthrie received a letter from Peters advising that Peters had requested another medical examination of the boy, which would be final, and that as soon as information was received from this examination he would be in a position to negotiate toward disposition of the matter and would advise Guthrie.

Guthrie heard no further from Peters until after April 1, 1959, the date the period for presenting a claim against Fett's estate expired. Plaintiffs had filed no claims. On May 14, 1959, Peters wrote Guthrie that Mitchell D. Onstott had been released by his physicians and that Peters would like to talk with Guthrie with reference to the matter. Peters wrote again on June 2, 1959, inquiring if Guthrie desired to meet with him in reference to the matter. Guthrie telephoned Peters on June 3, 1959, and advised him that no payment would be made because the claim was barred. Peters did not actually learn that Fett's estate had been opened July 1, 1958, until this June 3, 1959, conversation with Guthrie.

We perceive no error in the District Court's award of summary judgment to defendants-appellees. The fact that Guthrie shortly after he learned the estate had been opened, and long before expiration of the period for filing of the plaintiff's claims, left word at Peters' office that the estate had been opened July 1, 1958, negates the presence of intent to deceive either at the time of the September 11, 1958, conversation or thereafter. Surely, in the absence of further inquiry from Peters concerning the opening of the estate Guthrie had no basis to assume that the information had not been given to Peters and to therefore repeat the same in his October 24, 1958 telephone conversation with Peters. Peters had until April 1, 1959, to present the minor's claim

against the estate and he did not contact the defendants after December 2, 1958, at which time he stated he would advise defendants when a report on the final medical examination was received and "we should be in a position to negotiate toward a termination and disposition of this matter", until May 14, 1959, after the limitation period had expired.

Apart from the absence of any showing of intent on the part of the defendants to deceive plaintiffs, or to induce them not to file claims against the estate, there was no misrepresentation on which plaintiffs had a right to reply. Plaintiffs' former attorney was well aware of the Ohio limitations governing the filing of claims against decedents' estates. The opening of an estate for the decedent-insured in Paulding County, Ohio, was a fact equally accessible to both the attorney and the defendants. The September 11, 1958, conversation between the attorney and Guthrie does not import that Peters was to rely upon Guthrie to make the inquiries which might be necessary from time to time to learn if an estate had been opened, ascertain the fact, and supply Peters with the information. Nor under the circumstances here presented did the attorney have a right to rely that such was the understanding nor, under controlling principles stated in the Ohio decisions, to rely upon future silence on Guthrie's part as equating an affirmative representation that no estate had been opened and excusing inquiry on the attorney's part. Peters and Guthrie represented adverse interests and were dealing at arm's length. The attendant circumstances here are not those such as a relation of trust, or of confidence, or of inequality of condition or knowledge, which may give rise to a legal duty to communicate material matter to another and make silence in such circumstances an actionable fraud. Cf.

*Schubert* v. *Neyer*, Ohio App. (1959), 165 N. E. 2d 226, 231-232. And "[r]eliance—with a right to rely" is an element which "must be present if actionable fraud is to be found." *Crabbe* v. *Freeman*, Mun. Ct. of Col., Ohio (1959), 160 N. E. 2d 583, 585.

Plaintiffs' reliance upon *Pumphrey* v. *Quillen*, 165 Ohio St. 343, 135 N. E. 2d 328, and other cases which involved affirmative false statements and positive misrepresentations is misplaced. Such cases are not apposite on the facts of the case at bar. Here actionable fraud is attempted to be predicated upon silence under circumstances where no right to rely upon that silence existed. Cf. *Sigler* v. *Allstate Insurance Company*, 7 Cir., 319 F. 2d 418, where, in affirming summary judgment for the defendant, this Court held that plaintiffs' attorney's access to sources of information which would have furnished information as to another State's statute of limitations made it unnecessary for the District Court to have resolved the apparent conflict as to whether affirmative misrepresentation with respect thereto had been made to the plaintiffs.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, October 23, 1963

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

---

WILMER D. REKEWEG, as Guardian of MITCHELL D. ONSTOTT, a Minor; and HARVEY H. ONSTOTT,
*Plaintiffs-Appellants.*

vs.

FEDERAL MUTUAL INSURANCE COMPANY, and J. B. GUTHRIE,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appeal d from be, and the same is hereby, AFFIRMED, WITH Costs, in accordance with the opinion of this Court filed this day.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 20 1964
JOHN F. DAVIS, CLERK

No. 779.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

WILMER D. REKEWEG, as Guardian of Mitchell D. Onstott, a Minor, and HARVEY H. ONSTOTT,
Petitioners,

v.

FEDERAL MUTUAL INSURANCE COMPANY and J. B. GUTHRIE,
Respondents.

## RESPONDENTS' ANSWER BRIEF TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HUNT, SUEDHOFF & WILKS,
LEIGH L. HUNT,
WILLIAM E. BORROR,
625 Lincoln Bank Tower,
Fort Wayne, Indiana,
Attorneys for Respondents.

J. GARETH HITCHCOCK,
South Side of Square,
Paulding, Ohio,
HOWARD S. GRIMM,
Suite 5, Union Building,
Auburn, Indiana,
Attorneys for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

## INDEX.


Page

List of Authorities Cited ..... This page

Citations to Opinions Below ..... 1

Jurisdiction ..... 1

Questions Presented ..... 2

Statutes, Regulations and Law Involved ..... 4

Statement of the Case ..... 4

How Questions for Review Are Presented ..... 9

Reasons for Allowance of the Writ ..... 9


### List of Authorities Cited.


American Jurisprudence, Vol. 28 ..... 13

Copper Process Co. v. Chicago Bonding & Ins. Co. (3rd Circuit), 262 F. 66 ..... 13

Crabbe v. Freeman (1959), 81 Abs. 65, 160 N. E. 2d 583 ..... 4, 11, 16, 17, 18

Federal Rules of Civil Procedure, Rule 56 ..... 3, 14

Foster v. General Motors Corp. (Ct. of Appeals, 7th Circuit, 1951), 191 F. 2d 907 ..... 7, 10

Holmes, The Common Law ..... 11, 12

Kerr on Fraud and Mistake, 5th Edition ..... 15

Moore's Federal Practice, Second Edition ..... 7, 10

Ohio Jurisprudence, 2d Vol. 24 ..... 15

Schubert v. Neyer (1959), 12 O. O. 2d 231, 109 N. E. 2d 226 ..... 4, 13, 14, 15, 16, 17, 18

Sigler v. Allstate Ins. Co. (Ct. of Appeals, 7th Circuit, 1963), 319 F. 2d 418 ..... 18, 19

Wilkinson v. Powell (Ct. of Appeals, 5th Circuit, 1945), 149 F. 2d 335 ..... 7, 10

No. 779.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

WILMER D. REKEWEG, as Guardian of Mitchell D. Onstott, a Minor, and HARVEY H. ONSTOTT,
Petitioners,

v.

FEDERAL MUTUAL INSURANCE COMPANY and J. B. GUTHRIE,
Respondents.

## RESPONDENTS' ANSWER BRIEF TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

### CITATIONS TO OPINIONS BELOW.

Respondents agree with petitioners' citations appearing in this section.

### JURISDICTION.

Respondents must disagree with the petitioners' statement of the three grounds they allege give this Honorable Court jurisdiction to review the judgment. It will be shown in the body of this brief that, contrary to petitioners' point one (1), the real question here involved was

decided directly in **conformity** with applicable Ohio Law. Further, answering point two (2), it will hereinafter be shown that the summary judgment granted by the District Court was granted because there was no genuine issue remaining as to any material fact, and the attempts of petitioners to show otherwise will be demonstrated to be based on matters outside the record. Finally, point three (3) of petitioners' statement of jurisdiction not only fails to state grounds for jurisdiction in this Court, but also improperly implies that the decision of the Court of Appeals was improperly rendered.

## QUESTIONS PRESENTED.

Again respondents must express their disapproval concerning petitioners' statement of the questions herein presented. Petitioners' question No. 1:

> "1. Does Ohio Law recognize the Common Law action of fraud and deceit?"

is certainly not one of the issues presented in this case. Up until this time no one has questioned the fact that the Courts of Ohio recognize an action for fraud and deceit. Petitioners, in framing the issue above are either attempting to confuse this Court or are themselves unaware of the issues involved. The question actually presented to the trial court and to the Court of Appeals for the Seventh Circuit had to do with the **requirements** of an action for fraud and deceit based upon silence under Ohio Law. All of the briefs and arguments in the Courts below concerned what facts had to be found to exist to support a cause of action for fraud based upon silence under Ohio Law. That was the question presented, argued, and decided. Nowhere in any of the briefs, arguments or decisions below is there even the slightest question raised *that Ohio does* not recognize the Common Law action of

fraud and deceit. However by stating that this is one of the questions presented, petitioners have set up one of the proverbial strawmen that they can now knock down, using the same as a lever to get into this court, all of the time knowing so well that this "question" was never in dispute and was never decided in the case at bar.

Petitioners' second statement of the questions presented is equally unfounded. Question No. 2 as stated by Petitioners reads as follows:

> "2. Can petitioners, by summary judgment under Rule 56, Federal Rules of Civil Procedure, be deprived of a jury trial where there are unresolved genuine issues of material fact, and where a jury trial has been timely demanded?"

It is elementary to Rule 56 that summary judgment will not, and cannot, be granted if there still remains unresolved a genuine issue of material fact. It has long been these respondents' contention that no genuine issue of material fact was left for decision in this case, and this opinion was substantiated by the District Court's ruling on the Petition to Reconsider when the District Court granted summary judgment. Our position was reaffirmed by the Court of Appeals for the Seventh Circuit when they upheld the District Court. It will be pointed out hereafter that when summary judgment was granted in the District Court no material fact remained unresolved, but, that subsequently, and more particularly for the first time in petitioners' original brief in the Court of Appeals, we find them attempting to state that a certain material fact remained undecided when the Trial Court rendered the summary judgment. In an attempt to show this, these petitioners were forced to go outside the record of this cause, yet, even in so doing they were unable to convince the Seventh Circuit Court of Appeals that such fact, even

if it existed, as these petitioners contend, amounted to a material fact. These petitioners have now expanded on their deviation from the record in this cause and now boldly assert that the fact they first desired to controvert in the Court of Appeals is now the absolute truth of the matter and also is sufficient grounds for a reversal of the Court of Appeals and the District Court.

## STATUTES, REGULATIONS AND LAW INVOLVED.

Respondents do not understand that this section was meant to encompass the case law necessarily involved in the determination, but, since petitioners have seen fit to set forth two cases they believe controlling, respondents must challenge the completeness of the case law so cited. To clearly understand the decisions of the Court of Appeals and District Court below petitioners should have cited to this Court as case law necessarily herein "involved" the cases of **Schubert v. Neyer** (1959), 12 O. O. 2d 231, 109 N. E. 2d 226; and **Crabbe v. Freeman** (1939), 81 Abs. 65, 160 N. E. 2d 583. Petitioners' failure to cite the above two cases to the Court fails to properly apprise this Court of the entire law involved, as the above two citations were utilized both by the District Court and the Court of Appeals in their respective opinions as setting forth the law of Ohio on the questions presented to them. Of course, if petitioners are only required to cite the authorities they believe helpful to them, their omissions of the above two cases is more understandable.

## STATEMENT OF THE CASE.

Herein, petitioners set out several points allegedly omitted from the opinion of the Court of Appeals that petitioners believe important enough to warrant a dif-

ferent result if they had been included. Respondents will take these matters up in the order they are found in petitioners' brief.

Petitioners' first point is that the Court of Appeals omitted facts showing that respondent Guthrie told petitioners' then attorney David Peters that, in his opinion, the case had some settlement value, that the company was going to be fair and reasonable and would work out a settlement if at all possible, but, that final medical reports were necessary before this could be done. These are the points that petitioners have alleged amount to fraud because this case was never, in fact, settled. These are the "other attendant circumstances" petitioners have referred to so often in their briefs and arguments below that should have been held, so they say, a valid basis for **inferring** fraudulent motives to these respondents. No cases have ever been cited by these petitioners that would so hold and although these respondents have attempted to aid petitioners by themselves searching for such cases their efforts have been equally unrewarding, and therefore, it can be presumed that no such cases exist. What petitioners apparently want this court to hold is that in any case where an insurance adjuster discusses the possibilities of settlement with an attorney for a minor, if settlement is not forthcoming on terms agreeable to the minor, a fraud has thereby been committed on him. This is not the law in Ohio, or Indiana, or anywhere else, except possibly in the minds of the attorneys for these petitioners.

The second point petitioners state should have been included in the opinion of the Court of Appeals is equally unavailing to their position that these respondents have been guilty of fraudulent conduct, as all it alleges against these respondents is that Mr. Guthrie did **not** indicate to Mr. Peters that he **would not** disclose knowledge to

Mr. Peters of the opening of a Fett estate, if he learned such an estate had been opened. In understanding just what occurred between Mr. Peters and Mr. Guthrie at the time of the conversation referred to in this point of petitioners' statement of the case, respondents would set out below the verbatim sworn testimony of petitioners' then attorney, David Peters, so that his own words can be examined. This examination will reveal that Mr. Guthrie **made no promise** to Mr. Peters to advise him of any knowledge which he might subsequently obtain, and, even more importantly, it will clearly disclose that Mr. Peters **did not rely** on Mr. Guthrie to give him this information. Here follows a direct quotation from the sworn deposition of David Peters:

> "I stated that if I learned an estate was opened in Ohio I would communicate with him (Guthrie) and that if he learned of an estate being opened in Ohio I would like to have him advise me that such procedure had taken place. On that occasion we both concluded that as far as we knew Fett had no assets and he had no estate" (original record below pages 232, 233).

Upon the above request of these petitioners' own then attorney, David Peters, has been built the entire case of petitioners against respondents, based upon our allegedly fraudulent conduct in not keeping the promise petitioners say the above quotation shows was made, to inform Mr. Peters if and when knowledge of the opening of an estate was obtained. First, it is clear that no such promise was ever made, second, the above quotation clearly shows that Mr. Peters **did not intend to rely** upon Mr. Guthrie to inform him of the opening of any estate **as he expressed his own intention to also check into this matter by his statement that he would inform Guthrie if he (Peters) learned of such an opening of an estate.** For

these reasons, respondents are honestly amazed at the persistence of these petitioners in alleging, time and again, that Mr. Guthrie somehow bound himself to see to it that Mr. Peters learned of such an estate, and, further, that even though he attempted to so inform Mr. Peters on one occasion, since his attempt was apparently unsuccessful, although this was unknown to him, that he has still committed a fraud by not subsequently ascertaining that the information conveyed to Mr. Peters' secretary actually reached Mr. Peters!

Points 3 and 4 do not even purport to relate to any communications concerning the opening of the Fett estate between respondents and petitioners and are not significant to the decision of the Court of Appeals or the court below. Therefore, respondents will not burden the Court by discussing them here.

Point 5 warrants a discussion, not upon its merits, but upon its propriety in a brief such as this. What petitioners are attempting to do in this section is to say that they might hold back what proof they have on points in controversy until the time of trial and successfully refute a motion for summary judgment by the mere statement that they intend to offer proof in opposition to respondents' affidavits at the time of trial. This petitioners cannot do. It has been held that if the moving party, by affidavit or otherwise, presents material which would require a directed verdict in his favor, if presented at trial, then he is entitled to a summary judgment, unless the opposing party either shows that opposing affidavits are then unavailable to him, or, comes forward with some materials, by affidavit or otherwise showing a triable issue of material fact still existing. See **Foster v. General Motors Corporation** (Ct. of Appeals, Seventh Circuit, 1951), 191 F. 2d 907; **Wilkinson v. Powell** (Ct. of Appeals, Fifth Circuit, 1945), 149 F. 2d 335, and **Moore's**

**Federal Practice**, Second Edition, Volume 6, Section 56.11 (3), and the numerous cases cited therein.

When respondents filed their motion for summary judgment in the District Court below they accompanied said motion with the affidavit of Mr. J. B. Guthrie, wherein he stated, under oath, that he telephoned David Peters' office on October 3, 1958, and informed his secretary that an estate had been opened for Mr. Fett. This motion for summary judgment was filed on August 30, 1962, and the summary judgment was entered on November 28, 1962; during all of which time these petitioners failed to supply evidence, by affidavit or otherwise, that in any way disputed or challenged the sworn statement of Mr. Guthrie. Petitioners first challenged this affidavit in their brief on appeal to the Seventh Circuit. They did so at that time by going outside the record and making a statement as follows:

> "Appellants have been told that neither of the secretaries working for Peters during October, 1958, have any recollection of receiving any message from anyone that Fett's estate had been opened in an Ohio Court on October 3, 1958, or any other date." (Page 30 of Petitioners' [then appellants'] original brief on appeal to the Seventh Circuit Court of Appeals.)

Petitioners here say to this Honorable Court that they are presenting this petition to secure justice and fair play for their clients. Respondents are entitled to the same from petitioners. If it be a fact that petitioners' counsel have been told by the then secretaries for attorney David Peters that they had no recollection of receiving the call from Mr. Guthrie, this evidence should have been presented to the District Court in opposition to the motion for summary judgment. It is submitted that no such evidence was presented as Mr. Peters' secretaries **have no such recollection**.

Petitioners were forced to resort to this hearsay that comes from outside the record, in the Appellate Court, after they realized how weak their position actually was. Petitioners have gone even further in this brief respondents are here answering, in that, after making the "statement of the case" containing the allegation above referred to, petitioners spend the balance of their brief **assuming** Mr. Guthrie swore falsely and **base their entire charge of fraud upon their own above-mentioned "evidence" not found in the record**, if it be admitted, for purposes of argument, that Mr. Peters' secretaries had no such recollection, and the petitioners are here honestly reporting what these secretaries told them, **this evidence now comes too late.**

## HOW QUESTIONS FOR REVIEW ARE PRESENTED.

Respondents have no dispute with this section of petitioners' brief.

## REASONS FOR ALLOWANCES OF THE WRIT.

Respondents join with petitioners in apologizing for taking up this Honorable Court's time by this petition and our regret is more sincere because of petitioners' attempts to twist the issues to give this Court jurisdiction to allow the writ.

Petitioners state two reasons for the allowance of the writ, namely, that the courts below have completely failed to recognize the law of Ohio applicable to the facts of this case, and that summary judgment has been improperly utilized to deny to them a jury trial, since genuine issues of material fact still exist.

Petitioners discuss their second reason first, and, therefore, respondents will answer in the same order. The material fact that is still allegedly existing in this cause ap

parently is whether or not Mr. Guthrie made the phone call to Mr. Peters informing him of the opening of the Fett estate. As has been pointed out above, Mr. Guthrie's affidavit stood unchallenged in the District Court, **although the record therein clearly shows that these petitioners were given additional time on October 8, 1962, by the District Court to file additional affidavits in opposition to respondents' motion.** Petitioners filed nothing contradicting Mr. Guthrie's affidavit although seven (7) weeks passed between the time of their request and the time the District Court entered summary judgment in favor of these respondents. Respondents are amazed that these petitioners after asking for, and being given, time, which they failed to utilize to file affidavits in opposition, were able to place the following statement in their brief to this Honorable Court:

> "At the very least the District Court should have, upon the facts of record, given petitioners as plaintiffs reasonable time in which to produce clarifying evidence" (Petitioners' brief page 8).

**Petitioners had the time they now say the District Court refused to give them.** As pointed out above, nothing was filed, by way of affidavit or otherwise, in opposition to Mr. Guthrie's affidavit, and this was for the simple reason that Mr. Guthrie spoke the **truth.**

The cases cited above, to-wit, **Wilkinson v. Powell** (Ct. of Appeals, Fifth Circuit, 1945), 149 F. 2d 335, **Foster v. General Motors Corporation** (Ct. of Appeals, Seventh Circuit, 1951), 191 F. 2d 907, and the **many, many** cases found in the footnotes to the section of **Moore's Federal Practice**, hereinabove cited, clearly show that these petitioners were required to, in some way, refute or challenge the affidavits accompanying respondents' motion for summary judgment and could not hold back their evidence until the time of trial. Summary judgment procedures were designed for

cases such as this where no one disputes the facts in the District Court. Now, as an afterthought, these petitioners find they must dispute the facts to maintain their standing in court and they, therefore, must go outside the record and resort to matters outside the record which they made no attempt to place in the record when they were given the opportunity to do so by the District Court.

This case has already proceeded through two courts with all parties agreeing that the law of the State of Ohio controls. It is, therefore, somewhat surprising to these respondents to find such a great portion of petitioners' brief devoted to a quotation from Mr. Justice Holmes' book, **The Common Law.** It appears to be routine procedure for these petitioners to cite inapplicable quotations from eminent jurists in an attempt to convince one reviewing court or another of their position. In the Court of Appeals, these petitioners (then appellants) utilized the words of Mr. Justice Cardozo which, though eloquent, were inapplicable. Here petitioners' lengthy quotation from Mr. Justice Holmes, **The Common Law,** section on Fraud, Malice and Intent is likewise eloquent, but inapplicable. Petitioners predicate their attempted analogy of the case at bar to matters discussed in the above volume by Mr. Justice Holmes by stating that the "gravamen" of their complaint was the concealment of the opening of the estate by Mr. Guthrie. The evidence in the District Court was undisputed that not only did Mr. Guthrie **fail to conceal this fact** but he **communicated** this fact to Mr. Peters' office help. Further, and even more important to the determination of this question, is the fact that **Mr. Peters did not rely** on Mr. Guthrie to supply him with this information. This was pointed out in the direct quotation from the deposition of Mr. Peters set out above. **Reliance is an element of an action for fraud and deceit in Ohio as well as in all other jurisdictions.** See **Crabbe v.**

**Freeman**, 160 N. E. 2d 583 at page 585. It is noteworthy that the above Ohio case is not mentioned in petitioners' brief to this court.

Although these respondents are certain that the quotation from **The Common Law** does not aid these petitioners, some portions as set forth in petitioners' brief are quite helpful to this court in deciding the questions actually presented herein. Respondents would refer this court to page 12 of petitioners' brief wherein they quote from page 137 of **The Common Law.** Mr. Justice Holmes stated as some of the elements of deceit, as follows:

> ". . . Third, known facts sufficient to warrant the expectations or suggest the probability that the other party will act on the statement . . . Fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the matter of the statement must be such as would not warrant belief according to the ordinary course of human experience . . ."

Applying these general principles to the facts herein it should first be mentioned that there was no "statement" made to Mr. Peters at any time by Mr. Guthrie. Secondly, at the time Mr. Peters asked Mr. Guthrie to inform him if he learned of an opening of an estate it is admitted that there was no knowledge of the estate already being open by Mr. Guthrie at that time. **Therefore, the fraudulent intent suggested by this element could not possibly have been present.**

Mr. Justice Holmes states as a further ground that the falsehood of the statement must be known to the party uttering the statement or the utterance must be made recklessly. As was pointed out above, no "statement" was ever made by Mr. Guthrie nor was he then possessed of knowledge that could have made his silent assent, if such be the fact, knowingly false.

Petitioners then move on to a discussion of various Ohio cases they say are applicable to the case at bar.

What appellants have apparently never been able to understand is that most states, including Ohio, make a broad distinction between positive statements of fact uttered by a person and mere silence, in making the determination as to what conduct amounts to fraud. Every case cited from the State of Ohio, with the exception of **Schubert v. Neyer** (1959), 12 O. O. 2d 231, 165 N. E. 2d 226, were cases involving **utterances** of false statements. These cases have no applicability here. As petitioners state, **the gravamen of their action is based upon the silence of Mr. Guthrie** in not informing Mr. Peters that an estate had been opened for Mr. Fett after he learned of this fact. Although Mr. Guthrie did inform Mr. Peters, we will let that fact pass for the moment. To fairly present the issues to this Court as to what was actually decided by the Court of Appeals for the Seventh Circuit, petitioners should have set forth the following language from **Schubert v. Neyer**, found on pages 231 and 232:

> "'As a general rule' says 23 Am. Jur. 852, 'to constitute fraud by concealment or suppression of the truth there must be something more than mere silence or a mere failure to disclose known facts.' Such was also the holding in paragraph 4 of the syllabus in **Copper Process Co. v. Chicago Bonding and Insurance Co.**, 3 Cir., 262 F. 66, 67, 8 A. L. R. 1477 as follows: 'as a general rule, to constitute fraud by concealment or suppression of truth, there must be something more than mere silence; that is, there must be some occasion which imposes on one person the legal duty to speak in order that he may be placed on an equal footing, in which case failure to state a material fact is equivalent to a concealment, and amounts to fraud equally with affirmative falsehood.'

> Furthermore, 'where there is no obligation to speak, silence cannot be termed suppression and is not a fraud.' (23 Am. Jur. 852.)"

This distinction between an affirmative false representation and silence was recognized in some of the cases cited by petitioners to the Court of Appeals below with certain of petitioners' cases pointing out this distinction in clear language. Somehow, this distinction continues to escape these petitioners. It should be noted here in passing, that the District Court as well as the Court of Appeals, also held that Mr. Guthrie and Mr. Peters were parties dealing at arms' length from each other and that the circumstances present did not impose the obligation or duty upon Mr. Guthrie to speak. Both of the opinions below thereby demonstrate that under the authority of **Schubert v. Neyer**, supra, **it made absolutely no difference whether Mr. Guthrie did, in fact, communicate his knowledge of the opening of the estate to Mr. Peters since this above mentioned case made it clear that there was no duty imposed upon Mr. Guthrie to so communicate.** Therefore, it follows that the fact petitioners allege is still disputed could not, in any event, be a fact, **material** to the determination, made by either the District Court or the Court of Appeals. It is to be remembered that summary judgment is proper when there is no dispute of the **material facts**, regardless of the existence of others facts still in dispute. See Rule 56 of the Federal Rules of Civil Procedure.

Petitioners, throughout their briefs both here and in the Courts below, have treated the fact, allegedly concealed by Mr. Guthrie, as being something peculiarly within his knowledge and unavailable to all others. When it is remembered that the fact Mr. Guthrie is charged with concealing was that an estate had been opened in the County Court in Ohio for Mr. John S. Fett, the charge of concealment can be seen in its true light, to-wit, **that**

**Mr. Guthrie is being charged with concealing facts that are a matter of public record!** Such facts are discoverable by the exercise of ordinary diligence on the part of any attorney with only the most basic knowledge of probate practice. From Mr. Peters' office in Fort Wayne, a fifty-cent phone call to the Clerk of the County Court across the state line in Ohio would have given him the information Mr. Guthrie had supposedly been concealing. On this very point the above cited case of **Schubert v. Neyer** has this to say:

> "In 24 Ohio Jur. (2d) 683, it is said that: 'It is generally held that mere silence does not constitute fraud where it relates to particular facts and matters of such a nature as to be equally open to common observation or visible to the eye where such facts are discoverable by the exercise of ordinary diligence.'"

**Schubert v. Neyer** (1959), 12 O. O. 2d 231, 109 N. E. 2d 226, page 229.

On pages 230 and 231 of this same opinion the Court further states:

> ". . . And Kerr on Fraud and Mistake (5th Edition by Sidney Edward Williams 1920) has this to say in the matter. 'The law requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to the means of information which are accessible to them: Vigilantibus, non dormientibus, jura subveniunt. If parties are at arms' length either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. . . .'"

The above was the language pointed out to the Court of Appeals by respondents as representing the law of Ohio on the issue of whether silence on a given occasion amounts to fraud. Petitioners, by omitting this language from their petition, intentionally attempt to misstate the facts and law of this case, and then go on to say that the Court of Appeals decided this case contrary to the law of Ohio! It is too easily seen by the above quotations that the Court of Appeals and the District Court decided this case **directly under the authority of cases from the State of Ohio** such as **Schubert v. Neyer**, supra, to spend any more time refuting the ridiculous position of these petitioners.

As previously mentioned, for reasons of their own, these petitioners have entirely omitted from their brief any reference to the case of **Crabbe v. Freeman** (1959), 81 Abs. 65, 160 N. E. 2d 583. This case is quite pertinent here as it defines the five elements of fraud necessary for such a determination under the law of Ohio. Petitioners were quick to point our that they were alleging fraud as the basis of their action against these respondents, yet, by ignoring the case from Ohio that sets forth the elements of fraud under Ohio Law these petitioners are assuming a naiveté on the part of these respondents and this Court that does not exist. It would have been far more appropriate for these petitioners to set forth these elements of fraud and then attempt to apply the facts of the case at bar to show that these elements are present. However, since the undisputed facts will not support a finding of fraud under Ohio Law, petitioners chose to ignore these requirements in presenting their position to this court. For the enlightenment of all concerned, and most particularly the petitioners, respondents will hereinafter set forth the elements necessary to a determination of fraud based upon Ohio Law. **Crabbe v. Freeman** defined these elements on page 585 of the Northeastern Reporter Opinion as follows:

"1. A false representation: actual or implied, or the concealment of a matter of fact, material to the transaction, made falsely.

2. Knowledge of the falsity—or statement made with such utter disregard and recklessness that knowledge is inferred.

3. Intent to mislead another into relying upon the representation.

4. **Reliance—with a right to rely.**

5. Injury as a consequence of that reliance.

All of these elements must be present if actionable fraud is to be found. The absence of one element is fatal to recovery." (Emphasis supplied.)

Again respondents would call this Honorable Court's attention to the holdings of the courts below that in the case at bar there was, first, **no reliance**, and secondly, **there was no right to rely**. Therefore, even assuming a false representation or a concealment of something Mr. Guthrie had a duty to communicate with such concealment being intentionally done with an intent to mislead Mr. Peters and with that result ultimately being accomplished, **petitioners would still not have established a case against these respondents under the Law of Ohio**. Mr. Peters' statement that he would tell Mr. Guthrie if he learned of an estate being opened, and would like Mr. Guthrie to tell him if he so learned, **has been held on at least two separate occasions in the courts below to conclusively show that Mr. Peters did not, in fact, rely upon Mr. Guthrie to inform him of this fact**. Further, under the authority of **Schubert v. Neyer** and **Crabbe v. Freeman**, supra, since the concealment, if there was any, was of a matter equally accessible to both parties, with both parties dealing with each other at arms' length

and there could not, in law, exist any right to rely upon the other party, under these circumstances. As was said in **Crabbe v. Freeman**, "All of these elements must be present if actionable fraud is to be found." All of these elements **were not present** under the undisputed facts in this case. Certainly, petitioners will not now contend that Mr. Peters' sworn statement did not tell the whole story or was not true when he explained the circumstances surrounding his request that Mr. Guthrie inform him, if and when he learned of the opening of an estate. The circumstances surrounding this conversation between Mr. Guthrie and Mr. Peters have never been disputed.

After themselves omitting any reference to the above-mentioned case of **Crabbe v. Freeman**, supra, and after attempting to avoid the language of **Schubert v. Neyer**, supra, as set forth above; both of which cases are clearly, directly and definitely in point here, petitioners state that it was "inappropriate" for the Court of Appeals to cite their own case of **Sigler v. All State Insurance Company** (Ct. of Appeals, Seventh Circuit, 1963), 319 F. 2d 418, as "that case dealt with misrepresentations of foreign law, not matters of fact necessary to give foreign law effect" (Petitioners' brief, page 16). The validity of this subtle distinction, attempted to be drawn by petitioners, escapes respondents. In the **Sigler** case an insurance adjuster had made a positive representation that the Statute of Limitations concerning a claim was of two years' duration when in fact he **knew** it was of only one year's duration. He made this representation direct to the claimant, yet, the Court of Appeals held that since claimants were represented by an attorney and since the representation was of a matter that could easily have been ascertained, as to its truth or falsity, by claimant's attorney there was no **right to rely** upon such representation and therefore a case of fraud had not been made out.

This case is even stronger than the case at bar as here there is no claim that any positive misrepresentations were ever made. It is admitted that the **Sigler** case did not arise under, or was not governed by, the laws of the State of Ohio and, respondents are not attempting to state that it is controlling here. What is being attempted is to explain to these petitioners that the **Sigler** case shows that **reliance, with a right to rely** is the requirement, or element, of actionable fraud recognized in many jurisdictions.

Whether the **Sigler** case is in conflict with a District Court opinion from the State of New York it is not an issue here.

Petitioners close their brief with a plea that their clients ought not be deprived of the substance of their cause of action by the wily conduct of respondent Guthrie. Petitioners even go so far as to demand punitive damages as well as compensatory damages for the alleged deprivation. As has been shown, petitioners' plea of fraud is not supported by the record and if anyone has deprived these petitioners of their cause of action it was their then attorney, David Peters, who, by the way, bought his way out of this litigation for a consideration. (See appellants' original brief page 11.) Petitioners' unfounded and unsupported charges of fraud have a hollow ring when the facts of this case are examined. Petitioners' petition for Writ of Certiorari is likewise seen to be without substance when their asserted grounds for the issuance of the writ are examined in the light of the facts and applicable case law from the State of Ohio. These respondents have been forced through one unwarranted appeal already, and have now been forced to respond to petitioners' request for this writ. Furthermore, this petition alleges no proper ground under Rule 19 of this Court for such review when petitioners' "issues" are closely examined. Although peti

tioners demand punitive damages, respondents would state that punitive costs would be more appropriate relief and should be awarded to respondent since it has so clearly been shown that petitioners have gone outside the record to show "evidence" of respondents' alleged fraud and have intentionally misstated the issues decided below in an attempt to put this matter before this Honorable Court. It is respectfully and sincerely submitted by these respondents that this petition by petitioners is actually another attempt to force a settlement in this cause. Petitioners have tried this before and they are to fail in this attempt also, as they have failed in all previous ones, for the reason that there is here in issue, at least by implication and innuendo, the moral character of Mr. Guthrie which cannot, and will not, be compromised.

By reason of what has hereinabove been set forth showing the facts as they truly are, and under the applicable case law of the State of Ohio set forth in the body of this brief, it is respectfully submitted that this petition for the Writ of Certiorari should be and must be denied

Respectfully submitted,

HUNT, SUEDHOFF & WILKS.

By LEIGH L. HUNT.

WILLIAM E. BORROR